Supreme Court, U.S.
FILED

98 646 OCT 19 1998

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1998

JOHN H. PAYNE, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

*W. THOMAS DILLARD
RUTH T. ELLIS
RITCHIE, FELS & DILLARD, P.C.
606 W. Main Street, Suite 300
P.O. Box 1126
Knoxville, TN 37901-1126

(423) 637-0661

Attorneys for Petitioner
**Counsel of Record*

October 16, 1998

LEGAL ADVANTAGE * 432 Walnut Street * Cincinnati, OH 45202
(800) 581-2252

QUESTION PRESENTED

DOES THE TRIAL OF A CITIZEN IN A DISTRICT IN WHICH NO CRIMINAL OFFENSE HAS OCCURRED, ON THE BASIS OF AN EVIDENTIARY INFERENCE, VIOLATE THE CITIZEN'S CONSTITUTIONAL RIGHT TO BE CHARGED AND TRIED IN THE DISTRICT WHERE THE CRIME WAS COMMITTED?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS . 1

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 6

THE TRIAL OF A CITIZEN IN A DISTRICT IN WHICH NO CRIMINAL OFFENSE HAS OCCURRED, ON THE BASIS OF AN EVIDENTIARY INFERENCE, VIOLATES THE CITIZEN'S CONSTITUTIONAL RIGHT TO BE CHARGED AND TRIED IN THE DISTRICT WHERE THE CRIME WAS COMMITTED 6

CONCLUSION 21

APPENDIX . . . . . .

OPINION BY THE FOURTH CIRCUIT . . . App. 1

ORDER ON REHEARING OF THE FOURTH CIRCUIT . . . . . App. 11

AMENDMENT VI . . . . . App. 13

ARTICLE III Section 2 . . . . . App. 14

FEDERAL RULES OF CRIMINAL PROCEDURE RULE 18 . . . . . App. 15

18 U.S.C. § 1623 . . . . . App. 16

18 U.S.C. § 3231 . . . . . App. 18

28 U.S.C. § 1254 . . . . . App. 19

TABLE OF AUTHORITIES

Cases:

Armour Packing Co. v. United States
209 U.S. 56 (1908) 14

Boyd v. United States
116 U.S. 616 (1886) 7

Dunn v. United States
442 U.S. 100 (1979) 8,19,20

Hyde v. United States
225 U.S. 347 (1912) 19

In re: Palliser
136 U.S. 257 (1890) 7

Marbury v. Madison
5 U.S. 137 (1803) 8

Moskal v. United States
498 U.S. 103 (1990) 14

United States v. Anderson
328 U.S. 699 (1946) 14

United States v. Bomski
125 F.3d 115 (7th Cir. 1997) 12

United States v. Brown
786 F.2d 432 (D.C. Cir. 1989) 12

United States v. Cabrales
U.S. , 118 S.Ct. 1772, 141 L.Ed.2d 1 (1998) . 17

United States v. Gradwell
243 U.S. 476 (1917) 20

United States v. Heater
63 F.3d 311 (4th Cir. 1995) 12

United States v. Johnson
No. 323 U.S. 273 (1944) 7

United States v. Norris
300 U.S. 564 (1937) 19

United States v. Noveck
273 U.S. 202 (1927) 15

United States of America v. John H. Payne, Jr.,
No. 97-4449 (4th Cir. 6/24/98) 1

United States v. Reed
773 F.2d 477 (2d Cir. 1985) 13,15

United States v. Tibbs
600 F.2d 19 (6th Cir. 1979) 11

Constitutional and Statutory Provisions:

18 U.S.C. § 1621 19,20

18 U.S.C. § 1623 ..... passim

18 U.S.C. § 1623(a) ..... passim

18 U.S.C. § 1623 (b) 9

18 U.S.C. § 1623(c) ..... passim

18 U.S.C. § 1623 (d) 10,19

18 U.S.C. § 1623(e) 10,19

18 U.S.C. § 1951 15

18 U.S.C. § 1952 15

18 U.S.C. § 1956 (a)(1)(B)(ii) 17

18 U.S.C. § 3231 3

28 U.S.C. § 1254(1) 1

Federal Rules of Criminal Procedure Rule 18 7

Federal Rules of Criminal Procedure Rule 18,
the 1944 Advisory Committee Notes 14

United States Constitution Article III Section 2 1,6

United States Constitution Article III Section 2, cl. 3 18

United States Constitution Sixth Amendment 1,6

Senate Report:

S.Rep.No.91-617, 91st Cong., 1st Sess. 33,
at 58-59 (1969) 19

Books:

Webster's New World Dictionary,
Simon & Schuster, Inc. (10th ed. 1986) 16

---------- ♦ ----------

OPINIONS BELOW

The District Court Judgment was affirmed by the United States Court of Appeals for the Fourth Circuit on June 24, 1998. United States of America v. John H. Payne, Jr., No. 97-4449 (4th Cir. 6 /24/98.)

---------- ♦ ----------

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on June 24, 1998. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed on July 8, 1998. Rehearing was denied on July 21, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

---------- ♦ ----------

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution Article III Section 2

United States Constitution Sixth Amendment

18 U.S.C. § 1623

STATEMENT OF THE CASE

John H. Payne, Jr. has operated a business selling concrete, fertilizer and building materials for about thirty (30) years in his home town of New Tazewell, Tennessee. Because of the small size of New Tazewell, Mr. Payne has been called upon by members of the community for help in many ways. Often customers would ask Mr. Payne if they could purchase items from him on credit or would ask Mr. Payne to loan them money. Mr. Payne has provided credit and loaned money to many customers and other members of the community on numerous occasions. One of the customers to whom Mr. Payne gave credit and loaned money over the years was Henry Stanley Hayes.

Mr. Hayes became involved in illegal activities, for which he was tried and convicted in the United States District Court for the Western District of Virginia. Mr. Payne was not alleged to have been involved in these illegal activities. However, after Mr. Hayes was convicted, when Mr. Hayes' assets became an issue at Mr. Hayes' sentencing hearing, Mr. Payne was called upon to testify in the United States District Court for the Western District of Virginia about one of the many loans Mr. Payne had made to Mr. Hayes.

After Mr. Hayes sentencing was concluded, Mr. Hayes creditors filed an involuntary bankruptcy petition against Mr. Hayes in United States Bankruptcy Court. The United States

Bankruptcy Court was not in the Western District of Virginia, but was in the Eastern District of Tennessee. An issue in the Bankruptcy Court was what debts Mr. Hayes had repaid within the ninety (90) days prior to the filing of the bankruptcy petition against him. Mr. Payne's deposition was requested regarding the repayment of any loans by Mr. Hayes to Mr. Payne during the ninety (90) days preceding the filing of the bankruptcy petition. Mr. Payne's deposition was taken on two different occasions in the Eastern District of Tennessee in proceedings before or ancillary to the United States Bankruptcy Court for the Eastern District of Tennessee.

The government contended that statements made by Mr. Payne at these three proceedings were irreconcilably contradictory with one another.[1] Mr. Payne was thereafter indicted in the Western District of Virginia for perjury under 18 U.S.C. §1623.[2] Section 1623 provides that whoever knowingly makes a false material declaration under oath in any proceeding before or ancillary to any court or grand jury of the United States

---

[1]Neither the questioner at the sentencing hearing, nor the questioner at the depositions, nor the prosecution at Mr. Payne's perjury trial, in which he represented himself, *pro se*, appeared to be aware that Mr. Payne had made more than one loan to Mr. Hayes and that Mr. Payne's statements' concerned more than one loan.

[2]The district court had jurisdiction pursuant to 18 U.S.C. §3231 to hear allegations of a violation of a federal criminal statute.

shall be guilty of perjury. The indictment against Mr. Payne contained the evidentiary inference provided in subsection (c) of §1623 to prove a perjurious statement in violation of §18 U.S.C. §1623. Subsection (c) provides that a prosecution for perjury under §1623(a) may be undertaken by charging and proving two or more declarations, which are inconsistent to the degree that one of them is necessarily false, without proving which statement is false.

However, the indictment taken in the Western District of Virginia alleged as irreconcilably contradictory statements not just the statements made in the United States District Court for the Western District of Virginia, but also the statements made in depositions in Tennessee, which were not ancillary to the proceedings in the Western District of Virginia, but were ancillary to the bankruptcy proceeding in the United States Bankruptcy Court for the Eastern District of Tennessee. It should be noted that the indictment did not rule out a finding that the irreconcilably contradictory statements did not both occur in the Eastern District of Tennessee.

Mr. Payne was tried and convicted in the United States District Court for Western District of Virginia. At trial proof was not limited to Mr. Payne's testimony at proceedings before or ancillary to the proceedings in the United States District Court for the Western District of Virginia. Proof was also introduced regarding Mr. Payne's testimony at the depositions in Tennessee ancillary to the bankruptcy proceeding in the United States Bankruptcy Court for the Eastern District of Tennessee.

There was no proof at trial that Mr. Payne made a false statement, thereby committing a crime, in the Western District of Virginia either by direct proof of the falsity of the statement under §1623(a) or by using the evidentiary inference provided in §1623(c) of proving a false statement by proving two or more irreconcilably contradictory statements in proceedings before or ancillary to proceedings in the Western District of Virginia.

The United States Court of Appeals addressed this issue and affirmed Mr. Payne's conviction by a one sentence holding in a footnote: "Moreover, the indictment inadequately established venue in the Western District of Virginia, and venue was proper there because one of the inconsistent statements was made in a sentencing hearing in that district." (App. 5).

REASON FOR GRANTING THE WRIT

THE TRIAL OF A CITIZEN IN A DISTRICT IN WHICH NO CRIMINAL OFFENSE HAS OCCURRED, ON THE BASIS OF AN EVIDENTIARY INFERENCE, VIOLATES THE CITIZEN'S CONSTITUTIONAL RIGHT TO BE CHARGED AND TRIED IN THE DISTRICT WHERE THE CRIME WAS COMMITTED.

The United States Constitution twice provides to its citizens the protection of being tried for crimes in the state and district where the crime was committed. Article III, Section 2 states:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; . . . .

The Sixth Amendment commands:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

> process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Our nation's founders felt the impact of trial without the protection of that trial being had within the state and district in which the crime was committed. The Declaration of Independence includes statements by the founders against the King of Great Britain of the dire injustice which resulted from transportation of colonists "beyond Seas to be tried."

This Constitutional right is implemented in the Federal Rules of Criminal Procedure. Rule 18 requires:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed.

The Supreme Court of the United States has repeatedly stated that questions of venue in criminal cases raise deep issues of public policy in the light of which legislation must be construed, United States v. Johnson, 323 U.S. 273 (1944) and that the Sixth Amendment is to "be construed liberally in view of its history and the rights which it is designed to protect. Boyd v. United States, 116 U.S. 616 (1886); In re Palliser, 136 U.S. 257 (1890).

Even Though Previously Ruled Constitutional, A Statute May Be Applied in an Unconstitutional and Therefore Impermissible Manner.

Construing legislation constitutionally is the issue in this case. Should Title 18 United States Code Section 1623 be construed in a manner which renders its use unconstitutional? No. Case law uniformly holds that statutes must be construed in a manner consistent with the United States Constitution. Marbury v. Madison, 5 U.S. 137 (1803).

18 U.S.C. §1623 is on its face a constitutional statute and has been used constitutionally. Section 1623 has been the focus of analysis by numerous courts, including the Supreme Court of the United States, and those courts have not held it unconstitutional when it is used as Congress intended. Dunn v. United States, 442 U.S. 100 (1979).

However, 18 U.S.C. §1623 has never before been used as it has been used in this case.

18 U.S.C. §1623 states:

> (a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of Title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or

makes or uses any other information, including any book, paper, document, record, recording, or other material knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if -

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary

to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof by made by any particular number of witnesses or by documentary or other type of evidence.

18 U.S.C. §1623(a) establishes the crime of perjury for knowingly making a false material declaration under oath in any proceeding before or ancillary to any court or grand jury of the United States and provides the punishment for that crime.

Subsection 1623(c) does not establish a new crime, but states that under certain circumstances, the evidentiary inference provided in subsection (c) may be used to charge and

prove perjury under §1623(a). Subsection (c)'s evidentiary inference provides that when the defendant makes two or more declarations, which are inconsistent to the degree that one of them is necessarily false, neither the indictment nor the proof is required to specify which one of the statements is false.[3]

---

[3]"18 U.S.C. §1623(c) provides a statutory method of **charging** a witness with a violation of §1623(a):

> '(c) An indictment or information for violation of this section alleging that, . . . the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one or more of them is necessarily false, Need not specify which declaration is false. . .'"

Additionally, §1623(c) sets forth a method of **proving** false declarations:

> 'In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations . . . .'

Thus, under §1623(c), the government need not prove through extrinsic evidence which of two or more declarations is false. Rather, the falsity of one of the declarations will be inferred from its inconsistency with the other(s)."

18 U.S.C. §1623 Must Be Applied Constitutionally.

The evidentiary inference in subsection (c) may be constitutionally used to charge and prove perjury when a defendant has made two or more irreconcilably contradictory statements in the same proceeding, one irreconcilably contradictory statement in a parent proceeding and a second irreconcilably contradictory statement in an ancillary proceeding in the same district or one irreconcilably contradictory statement in a parent proceeding in one district and a second irreconcilably contradictory statement in an ancillary proceeding in another district. United States v. Bomski, 125 F.3d 115 (7th Cir. 1997); United States v. Heater, 63 F.3d 311 (4th Cir. 1995); United States v. Brown, 786 F.2d 432 (D.C. Cir. 1989). Because, in these fact situations, the two or more irreconcilably contradictory statements are both made within the same judicial district or in proceedings before or ancillary to that judicial district and because by definition, under the evidentiary inference, they are so inconsistent that one must be false, the false statement has by definition been made in that one judicial district. Hence, there is no question as to the district in which the false statement occurred. Constitutional venue is achieved without establishing which statement is false and constitutes the crime.

United States v. Tibbs, 600 F.2d 19 (6th Cir. 1979).

However, what has never been done, and what is being attempted in this case, is the use of §1623(c) to charge and prove perjury when a defendant has made two or more irreconcilably contradictory statements in two or more different districts, in proceedings that are not ancillary to one another. The result of such a practice would be to directly contradict the Constitution's requirement that a citizen be tried in the state and district where the criminal offense occurred. By definition the evidentiary inference does not require proof of which of the two or more statements is false and constitutes the crime. Under the evidentiary inference one of the statements is false and constitutes a crime, but one of the statements is true and constitute no crime. Since no proof is required as to which statement is false and which statement is true, it cannot be determined in which district the false statement was made and in which district the true statement was made. Under such circumstances, it is analytically impossible to prove venue in either district.

As stated above, no court has ever authorized §1623(c) to be used as it is suggested that it be used in this case. Courts have, however, held that there was venue under §1623(a) in the parent district, when a false declaration was made in an ancillary proceeding in a second district. United States v. Reed, 773 F.2d 477 (2d Cir. 1985).

A natural corollary of cases, such as Reed, is that if the false declaration made in the second district had not been in an ancillary proceeding, then venue would not lie in the district of

the parent proceeding. So too with §1623(c), if the second irreconcilably contradictory statement is not in a proceeding ancillary to the proceeding in which the first irreconcilably contradictory statement is made, then venue does not lie in the district of the parent proceeding.

Using other principles of statutory construction the same conclusion, i.e. that the evidentiary inference in §1623(c) cannot be used to establish venue, is reached.

The Plain Language of 18 U.S.C. §1623 Prevents Unlawful Venue.

The words of a statute are to be given their ordinary meaning. Moskal v. United States, 498 U.S. 103 (1990). The plain language of §1623 does not include an explicit venue provision. Congress could have easily included a venue provision in §1623, but chose not to do so.[4] When Congress does not determine venue explicitly, then "the locus delicti must be determined from the nature of the crime alleged and

---

[4] The 1944 Advisory Committee Notes to Rule 18 of the Federal Rules of Criminal Procedure point out that "numerous statutes have been enacted to regulate the venue of criminal proceedings, particularly in respect to continuing offenses and offenses consisting of several transactions occurring in different districts." (quoting Armour Packing Co. v. United States, 209 U.S. 56, 73-77 (1908).

the location of the acts [sic] or acts constituting it." United States v. Anderson, 328 U.S. 699, 703 (1946).

In examining the "nature of the crime" of perjury it can be seen that perjury under §1623 is a not a continuing crime. United States v. Reed, 773 F.2d at 483. The crime of perjury is complete when the oath is taken with the necessary intent. United States v. Noveck, 273 U.S. 202 , 206 (1927). The conduct that §1623 proscribes is the making of a false statement in a proceeding before or ancillary to a court or grand jury. This limited focus is in stark contrast with the intended national reach of acts such as the Hobbs Act[5] and the Travel Act,[6] which have been held to constitutionally provide venue in several districts and which are intended to reach the fullest constitutional breadth possible.

Section 1623 specifically delineates the location of acts which fall under it. Under §1623(a) the "location of the act" is in a "proceeding **before** or **ancillary** to any court or grand jury." Thus, the "location of the act" under §1623(a) is the location of the proceeding **before** which the oath is taken with the necessary intent or the location of the proceeding that is **ancillary** to that parent proceeding. Section 1623(a) only proscribes false statements in proceedings before or ancillary to a court or grand jury. Thus, venue under §1623(a) does not extend to proceedings in which statements were made that

---

[5]18 U.S.C. §1951.

[6]18 U.S.C. §1952.

were not proceedings before or ancillary to the **parent** proceeding.

In further examining the plain language of §1623(a), it is a false **declaration**, not **declarations**, that §1623(a) proscribes to be unlawful. One **declaration** would by definition be made in one place. Section 1623(c) does not enlarge the permissible locations for that declaration, but simply provides a means of proving the falsity of that one declaration.

The plain language of §1623(a) also requires that the one false declaration be "in any proceeding before or ancillary to any court or grand jury." As subsection (a) is referring to one declaration, one declaration analytically can only be made in one place and that one place under §1623(a) is "in any proceeding before or ancillary to any court or grand jury." Thus, the language "in any proceeding before or ancillary to any court or grand jury" in §1623(a) means "in any [one] proceeding before or ancillary to any court or grand jury."[7] This quoted language, "in any proceeding before or ancillary to any court or grand jury" is repeated *verbatim*, not just once, but twice in §1623(c). As the language is quoted *verbatim* from §1623(a) to §1623(c), under the principles of statutory construction, the meaning of the quoted language is construed to be identical in §1623(a) and §1623(c). Therefore, this

---

[7]Webster's Dictionary lists as one of the definitions for "any": "one, no matter which, of more than two." Webster's New World Dictionary, Simon & Schuster, Inc. (10th ed. 1986).

quoted language in §1623(c) must also refer to one proceeding. Since this language refers to **one proceeding**, this "one proceeding" must analytically be in **one place**. Since the language is referring to one place or one district, it cannot be used as a justification for statutorily extending venue to two or more districts. The quoted language was clearly not intended by Congress to do so.[8]

Recently, in United States v. Cabrales, U.S. , 118 S.Ct. 1772, 141 L.Ed. 2d 1 (1998) this Court looked to the plain language of the money laundering statute[9] to determine constitutional venue under that statute. The plain language of the money laundering statute defined the elements of the crime as the depositing and withdrawal of money. The Court held, therefore, that the location of the depositing and withdrawal of money established venue. The location to which the money was traceable did not establish venue, as tracing of money was not included in the plain language of the statute.

---

[8]If Congress had wanted to provide a venue clause within §1623, it would not have used this quoted language as it would be a clumsy method of doing so. Congress would have used the sort of clear concise language that it has used in venue clauses in many other statutes. Taking the analysis one step further, Congress would not have hidden a venue clause within §1623(a) or §1623(c), but would have created a separate subsection as a venue clause.

[9]18 U.S.C. §1956(a)(1)(B)(ii).

The Cabrales case is analogous to the instant case in that the Court looked to the plain language of the statute to determine the elements of the crime and venue. In the instant case the plain language of §1623 includes as one of the elements of the crime that the statements be made in proceedings "before" or "ancillary" to the parent proceeding. As discussed above, under the facts of this case, the statements were not made in a proceeding "before" or "ancillary" to the parent proceeding.

Inferences are Not Looked Upon with Favor.

Under the principles of statutory construction, inferences are not looked upon with favor. Inferences are legal fictions used for a limited purpose. The evidentiary inference in §1623(c) is one of negative implication. An evidentiary inference based upon a negative implication should, *a fortiori*, be construed very narrowly in a criminal prosecution.

Congress intended the evidentiary inference provided in §1623(c) to substitute for proof of the element of the falsity under §1623(a). The §1623(c) evidentiary inference is not explicitly or impliedly intended to substitute for proof of any other element, including venue.

Justice Holmes speaking in dissent spoke to the use of legal fiction: "Obviously the use of this fiction or form of words must not be pushed to such a point in the administration of the national law as to transgress the requirement of the

Constitution that the trial of crimes shall be held in the State and district where the crimes shall have been committed. Art. III, §2, cl.3. Amendments, Art. VI. With the country extending from ocean to ocean this requirement is even more important now than it was a hundred years ago, and must be enforced in letter and spirit if we are to make impossible hardships amounting to grievous wrongs." Hyde v. United States, 225 U.S. 347 (1912).

The Legislative History of 18 U.S.C. §1623 Provides Insight into Lawful Venue.

The legislative history of §1623 is insightful. 18 U.S.C. §1621 was the United States Code's most used perjury statute until §1623 was enacted in 1970 to address perceived evidentiary problems in demonstrating perjury under §1621. Dunn v. United States, 442 U.S. 100 (1979).

To remedy these perceived evidentiary problems, Congress made several changes from §1621 to §1623. Section 1623 throughout contains the lower mens rea requirement of "knowingly" rather than §1621's "willfully." Section 1623(c) provides an evidentiary inference of two or more irreconcilably contradictory statements to infer the element of falsity. This evidentiary inference abolished the evidentiary restrictions and permitted contradictory statements without more to form the basis of prosecution. S.Rep.No.91-617, 91st Cong., 1st Sess. at 58-59. Section 1623(d) provides for a recantation defense,

which was not available under §1621. United States v. Norris, 300 U.S. 564 (1937). The "two-witness" rule held to be required under §1621 was eliminated in §1623(e).

Another evidentiary change that §1623 provided was to make clear that perjurious statements in depositions or other proceedings ancillary to a particular case were to be included under §1623. Congress accomplished this by omitting the words "in any case," which had been used in §1621, and substituting "in any proceeding before or ancillary to any court or grand jury" in §1623. Thus, Congress' use of the language "in any proceeding before or ancillary to any court or grand jury" in §1623(a) and §1623(c) was for the purpose of including perjurious statements from depositions or other proceedings ancillary to a particular case and was not, as stated above, a clumsy attempt at a venue clause.

Rule of Lenity Requires 18 U.S.C. §1623 to be Strictly Construed.

A final rule of statutory construction, which compels the conclusion that venue does not extend its reach beyond that which Congress has defined, is the Rule of Lenity. Statutes delineating crimes are to be strictly construed and should not be interpreted to extend criminal liability beyond that which Congress has "plainly and unmistakably" proscribed. Dunn v. United States, 442 U.S. 100, 112-13 (1979) (quoting United States v. Gradwell, 243 U.S. 476, 485 (1917)). To extend

§1623(c) beyond the parameters, which courts have previously approved, would thwart the intent of Congress and the authors of the United States Constitution.

CONCLUSION

This petition addresses an attempt to expand the use of a constitutional statute in an unconstitutional manner. The statute, which is the subject of this petition, has been used constitutionally since 1970. There is no statute or case law to support such a change in use. To fail to address and remedy this unconstitutional use will subject citizens to trial in a state and district in which no criminal offense occurred.

Petitioner respectfully requests that a writ of certiorari issue.

Respectfully submitted,

*W. THOMAS DILLARD
RUTH T. ELLIS
RITCHIE, FELS & DILLARD, P.C.
606 West Main Street, Suite 300
P.O. Box 1126
Knoxville, TN 37901-1126
(423) 637-0661
Attorneys for Petitioner
*Counsel of Record

Table of Appendix Contents

4TH CIRCUIT FILINGS:

Opinion,
filed 6/24/98 . . . . . 1 - 10

Order Denying Petition
for Rehearing *En Banc*,
filed 7/21/98 . . . . . 11 - 12

Amendment VI 13

Article III, Section 2 14

Federal Rules of Criminal
Procedure, Rule 18 15

18 U.S.C. § 1623 . . . . . 16 - 17

18 U.S.C. § 3231 18

28 U.S.C. § 1254 19

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINION

Fourth Circuit Case Nº. 97-4449
Filed June 24, 1998

Pages App.1 thru App.10

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 97-4449
	)	
JOHN H. PAYNE, JR.,	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
for the Western District of Virginia, at Big Stone Gap.
Glen M. Williams, Senior District Judge.
(CR-96-53-B)

Argued: March 6, 1998
Decided: June 24, 1998

Before NIEMEYER, HAMILTON, and LUTTIG, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: William Thomas Dillard, RITCHIE, FELS & DILLARD, P.C., Knoxville, Tennessee, for Appellant, Steven Randall Ramseyer, Assistant United States Attorney, Abingdon, Virginia, for Appellee.

ON BRIEF: Ruth T. Ellis, RITCHIE, FELS & DILLARD, P.C., Knoxville, Tennessee, for Appellant. Robert P. Crouch, Jr., United States Attorney, Abingdon, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Defendant John H. Payne, Jr., was convicted in the Western District of Virginia of perjury under 18 U.S.C. § 1623(c) for knowingly making, under oath, "two or more declarations, which [we]re inconsistent to the degree that one of them is necessarily false," and which were material to the proceedings in which they were made. *Id.* The jury found that Payne "made irreconcilably contradictory declarations," *id.*, when he testified in one proceeding, in essence, that he had loaned his friend, Henry Stanley Hayes, $60,000 and that Hayes had repaid $56,000 of that loan, and then testified in a subsequent proceeding that, although the money for the $60,000 loan literally sat on the table, Hayes could not produce the requested collateral and therefore Payne never gave him any of the money. When questioned by an FBI officer about these contradictions in his testimony, Payne was unable to explain them. J.A. at 45.

Nevertheless, Payne challenges the sufficiency of the evidence for his conviction by arguing to this court--as he argued to the jury--that his statements were not irreconcilably contradictory because there were actually two separate loan transactions of around $60,000, one of which was consummated and one of which was not, and that he was talking about a different transaction in the first court proceeding than in the second. There is no suggestion in Payne's testimony at either proceeding, however, that Payne had made (or offered to make) two $60,000 loans to Hayes. In fact, Payne not only failed to mention the existence of two such loans at any of the critical junctures in his testimony at which he would naturally have offered that information, he also implied that no other $60,000 loan existed. Thus, a rational jury could certainly have found, as the jury in this case did, that Payne was talking about the same transaction in both court proceedings, and that his statements about that transaction were irreconcilably contradictory. The judgment below is therefore affirmed.[10]

---

[10]Contrary to defendant's assertion, the prosecutor adequately identified which statements were inconsistent in his opening statement. J.A. at 26-32. Additionally, the indictment adequately alleged the offense with which defendant was charged. Defendant has challenged the sufficiency of his indictment because, while the indictment charged that he had made inconsistent statements in the identified proceedings "concerning loans to Henry Stanley Hayes and payments from Henry Stanley Hayes," J.A. at 7-8, it did not specifically identify which statements in those proceedings were inconsistent. Payne first challenged his indictment post-trial, and thus the indictment is liberally construed and "every indictment is . . . indulged in support of [its] sufficiency," *Finn v. United States,* 256 F.2d 304, 307

On October 20, 1994, Payne testified in the Western District of Virginia at the sentencing hearing of his "old friend," Hayes, J.A. at 34-35, who had been convicted of fraudulently offering to sell government vehicles that he did not own. J.A. at 43. Payne's testimony was apparently offered for the purpose of explaining where the proceeds of Hayes' fraudulent scheme had gone. When asked whether he had loaned Hayes any money, Payne testified that he had, and when asked how much he had loaned Hayes, Payne testified that he had "loaned [Hayes] six notes, ten thousand dollars each." J.A. at 288. Payne was also asked whether "Mr. Hayes pa[id him] back sixty thousand dollars," and Payne testified that "[Hayes] paid it all back except four thousand." J.A. at 290. Specifically, Payne testified that Hayes paid him back--mostly with cashier's checks--in "December and January, December of '93, January of '94, and the last payment was made probably late March. He paid six thousand dollars on this last note." *Id.* On cross-examination, Payne confirmed that Hayes had paid him back $56,000 in 1994. J.A. at 293.

(4th Cir. 1958) (holding that "[i]ndictments and informations are construed more liberally after verdict than before" because after trial it is "too late" for the government to cure any defect "by a simple amendment"). Because the indictment gave fair notice to Payne of the charges against him and would enable him "to plead double jeopardy in defense of future prosecutions of the same offense," *United States v. Sutton*, 961 F.2d 476, 479 (4th Cir. 1992), the indictment is clearly sufficient. Moreover, the indictment adequately established venue in the Western District of Virginia, and venue there was proper because one of the inconsistent statements was made in a sentencing hearing in that district.

One of the victims of Hayes' fraudulent scheme then instituted involuntary bankruptcy proceedings against Hayes in the Eastern District of Tennessee. Seeking to recover as much as Hayes' money as possible to permit equitable distribution to Hayes' many creditors (most of whom were victims of his scam), the bankruptcy trustee filed an adversary proceeding against Payne--based on Payne's testimony at the sentencing hearing--to recover as voidable preferences those payments that Payne had testified Hayes made to him during 1994. J.A. at 49-50. Thus, if Payne testified in the bankruptcy proceedings that Hayes had repaid him more than $50,000 of a $60,000 loan, he risked being forced to disgorge that money to the bankruptcy estate and recovering only a small percentage of that money in the equitable distribution.

At his August 11, 1995, bankruptcy deposition in the Eastern District of Tennessee, Payne was asked specifically about the $60,000 loan to Hayes:

Q[uestion]: One of the things Mr. Hayes has testified to is--he has told us he executed six, ten thousand dollar notes with you, is that correct?

A[nswer]: Probably.

Q[uestion]: He was unable to tell the time frame, but the way he was describing it, it was in the latter part of the nineties, most recent time, is that correct?

A[nswer]: Probably, yeah.

J.A. at 229. When asked how the notes arose, Payne testified that "[t]hey was two or three timing frames there and I can't--I'll have to get that telephone thing, because he was trying to build a fire

log, like you burn in a fireplace." J.A. at 231. He also explained that "these borrowings" "were going to purchase an extrusion machine for the fire log which packs it, squirts it out . . . And that's what the loan money came up about on that." J.A. at 232. Payne further testified that a "UCC-1" on the extrusion machine was to serve as collateral for the loan. J.A. at 232-33.

Payne was then asked "[D]id you ever actually loan him sixty thousand dollars?" J.A. at 233. Payne replied, "Well, the money sat on the table, but he didn't get it until he got the machine." J.A. at 233. The questioner then attempted to clarify Payne's response, and Payne confirmed that Hayes had never actually received any of the $60,000:

Q[uestion]: So let's go back now. When you say the money sat on the table, did you physically have sixty thousand dollars in cash, check or anything on the table for him to see?

A[nswer]: Yeah.

Q[uestion]: You actually had it?

A[nswer]: Yeah.

Q[uestion]: Did he get it?

A[nswer]: No, he wouldn't produce the machine. I told him without a UCC-1 filed, we'd just quit right there. And when we quit was about the time he brought that first cashier's check in on me. And that is when he got the notes back.

Q[uestion]: So he never--did he sign the notes?

A[nswer]: He signed the notes.

Q[uestion]: But he never really got the money from it, is that right?

A[nswer]: Right.

J.A. at 233. Upon further questioning, Payne confirmed yet again that, although Hayes had not signed the six, ten thousand dollars notes, Hayes never got the money and Payne gave the money back to his own children. J.A. at 235.

In a telling exchange, Payne was then asked, "So when Mr. Hayes says that all but five thousand dollars of *that* sixth thousand dollars was repaid, he's mistaken. None was really repaid, because none was really loaned, is that right?" J.A. at 236 (emphasis added). Rather than explaining that Hayes was not in fact mistaken, but was simply talking about a *different* $60,000 transaction, Payne replied, "Basically." *Id.* The questioner then pinned Payne down on that response:

Q[uestion]: What is wrong about that statement?

A[nswer]: Well, nothing. The other money come from me; it didn't come out of the kids' money.

Q[uestion]: Was there some other money in addition to the sixty?

A[nswer]: I had loaned him four thousand dollars.

Q[uestion]: He still owes you for that, is my understanding?

A[nswer]: Yes.

Id.

Thus, when asked whether there was other money--in addition to the $60,000 that sat on the table--Payne testified only about the separate $4,000 transaction, and did not mention a separate $60,000 loan. Moreover, Payne specifically confirmed that the only money that he had loaned Hayes was that four thousand dollars, various small amounts for poker and gambling debts that Hayes would request late at night from Payne--who worked nights near the club where Hayes gambled--J.A. at 228, and some invoices on goods Payne sold to Hayes that Hayes did not pay up front:

Q[uestion]: So as I understand your testimony, the only real monies you gave to him, in terms of a loan was the four thousand dollars and various borrowings for his poker debts or gambling debts?

A[nswer]: Yeah, and then I was--there is one of those invoices in there he didn't pay up front.

J.A. at 237. Payne did not so much as suggest the existence of any separate $60,000 loan.

And, again, when Payne was asked why Hayes would have testified in his sentencing hearing that Payne had loaned Hayes $60,000 dollars (and that Hayes had paid $55,000 back to Payne) while Payne was testifying in the bankruptcy proceedings that the $60,000 was never actually loaned, Payne did not explain that he and Hayes were talking about two different $60,000 transactions. Instead, Payne suggested that the reason Hayes has said that he paid $55,000 back to Payne on a $60,000 loan was so that Hayes would not have to explain where the proceeds from his scam had gone:

Q[uestion]: Why would he say--can you think of any reason why he would say he borrowed sixty thousand from you and paid all of it back but fifty-five thousand?

A[nswer]: Sure.

Q[uestion]: Why?

A[nswer]: Because of all those invoices. He's bought all of that stuff, and he used them to pay for that.

Q[uestion]: You think that is why he thinks he's borrowed sixty thousand from you?

A[nswer]: No, the reason it is he don't want to have to explain where all that went.

J.A. at 238.

A jury could certainly find from the foregoing testimony that Payne was discussing only one $60,000 transaction at the sentencing hearing and during the bankruptcy proceedings, and that Payne made irreconcilably contradictory statements about that transaction. Thus, we affirm the judgment below.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ORDER DENYING PETITION
FOR REHEARING *EN BANC*,

Fourth Circuit Case Nº. 97-4449
Filed July 21, 1998

Pages App.11 thru App.12

App. 11

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-4449
CR-96-53-B

UNITED STATES OF AMERICA

Plaintiff--Appellee

v. Filed July 21, 1998

JOHN H. PAYNE, JR.

Defendant--Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMENDMENT VI

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ARTICLE III, SECTION 2

ARTICLE III
Section 2.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL RULES OF CRIMINAL PROCEDURE
RULE 18

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 18.
Place of Prosecution and Trial

Except otherwise as permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice. (As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 30, 1979, eff. Aug. 1, 1979).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

18 U.S.C. § 1623

Pages App.16 thru App.17

18 U.S.C. § 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if-

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

18 U.S.C. § 3231

Pages App.18

18 U.S.C. 3231 District Courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

28 U.S.C. § 1254

Pages App.19

28 U.S. C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Courts by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.